Attorney General
Betty D. Montgomery

May 29, 1996

Via Overnight Mail

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20554

Re: *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98

Dear Mr. Caton:

Enclosed please find the original and seventeen copies of the **Reply Comments of the Public Utilities Commission of Ohio Phase I** in the above-referenced matter. Please return a time-stamped copy to me in the enclosed stamped, self-addressed envelope.

Thank you for your assistance in this matter.

Respectfully submitted,

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STN/kja

Enclosure

cc: Janice Myles, Common Carrier Bureau
International Transcription Services, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO (PHASE I)

SCOPE OF REGULATIONS

Several parties predictably endorse the NPRM's tentative conclusion that 47 U.S.C. § 152(b)'s express limitation of the FCC's jurisdiction is implicitly superseded by Sections 251 and 252 of the 1996 Telecommunications Act (1996 Act). NPRM at ¶ 39. Ohio's Initial Comments thoroughly addressed the jurisdictional issue by demonstrating that Congress directly rejected proposals to amend 47 U.S.C. § 152(b), and showing that the 1996 Act directly prohibits the kind of sweeping implied preemption theory being advanced by the FCC and selected commentors. Ohio Comments at 11-17. None of those arguments are defeated by other commentors. In fact, most of the arguments advanced by commentors in support of the NPRM's jurisdictional conclusions are thoroughly discredited in Ohio's initial comments. However, certain commentors do raise novel, yet equally unavailing, arguments in support of the NPRM's tentative conclusions regarding jurisdiction. Ohio will not reiterate its comprehensive legal argument, but will briefly address the "new twists" that are suggested in the comments of MFS, Time Warner and AT&T.

MFS argues that "the *specific* provisions of Sec. 251 with respect to rates, terms, and conditions of service for particular types of carrier-to-carrier arrange-

ments must take precedence over the more *general* jurisdictional provision of Sec. 2(b) which applies to communications services generally." MFS Comments at 7 (emphasis added). This argument is clearly misplaced and without merit. Section 251 of the 1996 Act cannot be properly characterized as specific when compared to Section 2(b), codified at 47 U.S.C. § 152(b), because the two statutes do not address the same topic. Consequently, there is no need to utilize any statutory construction canon that is designed to reconcile potential conflicts between statutes addressing the same topic.

Section 251 simply does not address the FCC's jurisdiction or even mention anything about intrastate telecommunication services. So, there is nothing to supplant or displace the express and uniform limit on the FCC's jurisdiction found in 47 U.S.C. § 152(b). Further, as mentioned in Ohio's initial comments, the 1996 Act specifically admonishes against construing the Act as impliedly preempting states because the Congress knew when it wanted the States to be preempted and did so expressly. Section 601(c). In short, Sections 251 and 252 have to be read like every other provision in Title 47, as being subject to 47 U.S.C. § 152(b) unless expressly overruled in a particular instance by Congress.

In the same vein, Time Warner argues that, because 47 U.S.C. § 152(b) was enacted long before the 1996 Act, it may not be interpreted in a way that limits implementation of the 1996 Act.[1] Time Warner Comments at 8. AT&T also argues that "the explicit provisions of the subsequently enacted Section 251 would

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1 Time Warner's overall position taken in its comments (*i.e.*, that the FCC should promulgate prescriptive national interconnection regulations) is disingenuous. The PUCO's extensive efforts relative to Time Warner's interconnection with Ameritech have been undertaken at Time Warner's urging. In particular, Time Warner argued that under the 1996 Act "there is nothing that is taken away from the states in terms of the state's ability to fashion interconnection arrangements." PUCO Case No. 96-66-TP-CSS, Tr. I (February 29, 1996) at 44 [transcript excerpt attached]. Time Warner also argued that the PUCO, in arbitrating and ordering an interconnection agreement between Time Warner and Ameritech, "has every right to proceed under existing state law." *Id.* at 46. Time Warner's currently-advocated approach in the FCC's NPRM, which has the significant potential of undermining the PUCO's substantial efforts under Ohio, is disingenuous at best.

impliedly repeal the provisions of Section 2(b) even if they could otherwise be found applicable." AT&T at 6. These arguments, of course, beg the question entirely. The only time the "later enacted" statutory construction canon is properly utilized is when there is a direct conflict between two statutes addressing the same topic. Since Section 251 does not address jurisdiction and does not even mention intrastate services, there is no conflict between that provision and 47 U.S.C. § 152(b).

As a related matter, Time Warner argues that "[h]ad Congress sought to limit the scope of the 1996 Act to interstate and foreign services . . . it would have so stated." Time Warner Comments at 8. This conclusion plainly exposes the fallacious reasoning employed to support such an interpretation. It cannot reasonably be concluded (as Time Warner's unbounded statement suggests) that the entire 1996 Act displaces state authority with respect to every topic addressed therein. To the contrary, with respect to access and interconnection regulations promulgated by states, Congress affirmatively crafted a broad savings clause to preserve state regulations that are consistent with, and do not substantially prevent implementation of, the 1996 Act. Section 251(d)(3).

Incredibly, with respect to Section 251(d)(3), AT&T argues that this provision is an FCC "sword" to be used to support a sweepingly preemptive approach, rather than a state "shield" to defend such an attack. AT&T Comments at 5. Of course, the title of Section 251(D)(3) is "PRESERVATION OF STATE ACCESS REGULATIONS." The stated purpose of the provision is to preserve or "grandfather" most if not all state access and interconnection regulations. The measure by which the state regulations are saved are the requirements of Section 251 and substantial implementation of Section 251. Section 251(d)(3). Thus, it is clear that Congress intended to preserve, not broadly preempt, state access and interconnection regulations. The proposition that Congress would have expressly limited the jurisdictional scope of the 1996 Act if it had intended to limit the FCC's jurisdiction

to interstate and foreign services completely turns Title 47 on its head. It is beyond dispute that Congress knew and intended that the 1996 Act would be integrated into the existing Title 47, and that 47 U.S.C. § 152(b), with its unequivocal clarity and simplicity, would remain intact. Finally, Time Warner's and AT&T's interpretation of Section 251 conveniently ignores the fatal blow to such a supposed legislative intent in that the 104th Congress, actually considered and ultimately rejected an amendment to 47 U.S.C. § 152(b) in the process of enacting the 1996 Act. 141 Cong. Rec. H. 8425, 8431.

AT&T further suggests that the FCC should promulgate uniform, nationwide rules because the time frame for states to perform arbitration and related duties is simply not enough time for states to sort out all of these complex issues. AT&T at 8. It is illogical to assert that 9 months is not enough time for a state to address a single arbitration dispute, but that 6 months is sufficient time for the FCC to promulgate specific rules that encompass and contemplate all of the issues that all of the states will be presented with in the many upcoming proceedings under Section 251. Moreover, as a practical matter, many aggressive states like Ohio will have finalized their comprehensive local competition rules well before the FCC completes this NPRM. Any "secondary" attempt by the FCC to displace state regulations that are consistent with the 1996 Act will undoubtedly result in delay and confusion, and will not promote the rapid deployment of local competition. Therefore, the time constraint arguments advanced by AT&T and others are illogical and unpersuasive.

AT&T next argues that the FCC will increase its own regulatory burden if it fails to enact uniform, national rules because the FCC "would inevitably be required to define Section 251's minimum requirements after the state proceedings were concluded." AT&T at 9. Of course, the Act provides that the FCC will only be required to step in and act if a state fails to act, which is extremely unlikely and remote. Section 252(e)(5). In any event, the promulgation of specific rules does not preclude

the need for secondary FCC proceedings even in that remote circumstance. The FCC would still have to undertake a "clean up" role at that point. If the current rules are crafted in such a way that effectively precludes the primary and substantive state role as was so clearly directed by Congress, such an approach would run afoul of Section 252(e)(5)'s directive for the FCC to remain in the "backup" position to act only if states fail.

Under Ohio's advocated regulatory model, the FCC would adopt minimum requirements and broader-based guidelines. Those rules, in conjunction with the express requirements and standards set forth in the 1996 Act itself, would serve to adequately guide states and reviewing courts in their respective roles under Section 251. In the unlikely event that the FCC has to assume jurisdiction for the failure of a state to act, the FCC is entirely capable of processing and deciding those cases without issuing specific rules now. Moreover, if the FCC wanted to promulgate such rules now, the Ohio approach provides that those rules could serve as a model and would be available for voluntary adoption by some states (and could be used if there is a Section 252(e)(5) proceeding before the FCC). Finally, the more general and minimalist FCC rules advocated by Ohio could be used even in Section 252(e)(5) proceedings to draw upon and guide the FCC in making its own case-by-case decisions. In any event, the remote possibility of Section 252(e)(5) proceedings should not be the driving force behind the FCC's overall effort to implement Section 251 as is suggested by AT&T.

AT&T next argues that the FCC should promulgate prescriptive rules now because federal courts, if presented with appeals under Section 252, will refuse to give state decisions any deference and will refer the matter to the FCC under the doctrine of primary jurisdiction. AT&T Comments at 10. These assertions are grossly inaccurate and reflect a misconception of both the 1996 Act and the doctrine of primary jurisdiction. First, AT&T's position that a state commission's arbitration

decision "is entitled to, and will receive, no deference by a federal court" (AT&T Comments at 10), ignores the basic structure and purposes of the 1996 Act.

Congress unmistakably vested the states with substantial authority and responsibility in making arbitration decisions under Section 252. Although such an express state role in directly implementing a federal statute is relatively rare, it does not mean that the resulting state decision is entitled to no deference when being reviewed in federal court. Unlike most situations where a federal statute is enacted giving a federal agency exclusive authority to implement the statute, the 1996 Act unequivocally creates a dual regulatory role for the FCC and the state commissions to work together to complete the monumental tasks at hand.

Because the states are expressly allocated by Congress the responsibility to preside over and conduct the arbitration proceedings under Section 252, it is unreasonable to conclude (as AT&T does) that a state decision in compliance with Section 252 would not be entitled to deference by a reviewing federal court. It is folly to suggest that federal courts will want to conduct a *de novo* proceeding in every Section 252 appeal, whether or not the FCC implements specific or general rules for interconnection. Perhaps the most compelling authority to demonstrate AT&T's error in this regard is Section 252 itself.

Congress provided that federal courts reviewing state decisions under Section 252 would be conducted for the sole purpose of determining "whether the agreement or statement meets the requirements of section 251 and this section." Section 252(e)(6). This standard of judicial review is limited in that it does not require the federal court to conduct a *de novo* proceeding, but instead requires the court only to determine whether the state decision comports with the requirements of Sections 251 and 252. In other words, this limited standard of judicial review makes clear that federal courts will not be substituting their judgment on "second guessing" the involved state commission decision. As such, this limited scope of judicial review

is also further evidence that Congress did not expect the FCC to promulgate prescriptive and detailed rules under Sections 251 and 252, and that the state decisions will be measured by the requirements of those two statutes. Therefore, not only would it be unwise and completely impractical for a federal court not to give substantial deference to a state decision under Section 252, the limited standard of judicial review mandates that result.

As a related matter, AT&T's argument that the doctrine of primary jurisdiction necessitates that the FCC promulgate specific rules now is misguided. The doctrine of primary jurisdiction is inapplicable to federal court proceedings under Section 252(e)(6), whether or not the FCC issues prescriptive rules. The doctrine applies where a federal court action involves a sub-issue that could substantially benefit from the specialized agency review or decision that has not yet been given. *Reiter v. Cooper*, 122 L.Ed.2d 604, 617-618 (1993).

By the time a state arbitration is appealed into federal court, the FCC will have long since exercised its specialized knowledge and expertise in promulgating the rules in this NPRM. By issuing the rules in this NPRM, the FCC will have already spoken on the technical issues for which the Court might arguably seek guidance under the primary jurisdiction doctrine. Further, in the 1996 Act, the Congress has specifically assigned the federal court jurisdiction over state arbitration decisions and has provided the particular standard of judicial review to be applied in Sections 251 and 252. Section 252(e)(6). The federal court's duty is clear and limited. Under a proper primary jurisdiction referral, the federal court reserves jurisdiction over the entire matter and refers a technical issue for administrative decision. *Reiter v. Cooper*, 122 L.Ed.2d 604, 617 (1993). It would be unreasonable for a federal court to conclude that a primary jurisdiction referral is appropriate from a Section 252(e)(6) appeal, given that Congress has specifically conferred the clear and limited judicial

review function directly to federal courts. Therefore, AT&T's position that specific rules are required by the doctrine of primary jurisdiction should not be entertained.

RECIPROCAL OBLIGATIONS

The NPRM invited comment on whether obligations that are imposed by the 1996 Act on ILECs may be also required of other parties of an agreement so that the obligations are reciprocal. NPRM at ¶ 45. The Department of Justice (DOJ) "opposed any proposal to impose mandatory duties to deal, beyond those duties deemed necessary by Congress, on parties that lack significant market power." DOJ comments at 32. In support of its position, the DOJ relies primarily on the general antitrust principle that a party has a right to refuse to deal with potential rivals. DOJ comments at 33.

First, it is not entirely clear as to whether the DOJ would oppose any reciprocal obligations for new entrants or whether the "refusal to deal" principle would merely encompass the ILEC's duty to negotiate in good faith under Section 251(c)(1). Ohio believes states should be able to require reciprocal obligations of new entrants in those circumstances where states find that requiring a particular reciprocal obligation would advance competition and is in the public interest. Mutual obligations could arguably promote the efficient utilization of the facilities of new entrants, as well as that of ILECs, and thereby foster a broader base of competition. Congress did not intend to preclude the states from imposing reciprocal obligations in this regard. In the context of preemption, Congress commonly allows states to impose stricter requirements than federal law where the state regulations are not inconsistent with, or prevent implementation of a federal law. Relative to this issue, Section 251(d)(3) provides the standard for reviewing state interconnection regulations. Contrary to the argument advanced by DOJ, reciprocal obligations do not violate the "refusal to deal" principal of antitrust law. New entrants are already forced to deal with ILECs under the 1996 Act, and

reciprocal obligations would better define the respective duties of new contract and ILECs. Given that ILECs are required to negotiate in good faith regarding *all* of the obligations, allowing states the flexibility to impose *certain* reciprocal obligations by utilizing their expertise and discretion, where appropriate, would ensure a more balanced and tailored equitable approach that is in the public interest.

CONCLUSION

In closing, the PUCO wishes to thank the FCC for the opportunity to file comments in this docket.

Respectfully submitted,

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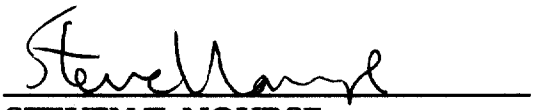
DUANE W. LUCKEY
Section Chief



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ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

MC GINNIS & ASSOCIATES, INC.
COLUMBUS, OHIO (614) 431-1344

BEFORE THE PUBLIC UTILITIES COMMISSION

STATE OF OHIO

- - -

In the Matter of the Complaint Of Time Warner AxS of Ohio, Limited Partnership, and Time Warner Communications of Ohio, Limited Partnership, Complainant, vs. Ameritech Ohio. Respondent.	)))))))))	Case No. 96-66-TP-CSS

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Hearing Room 11A
Borden Building
180 East Broad Street
Columbus, Ohio 43266
Thursday, February 29, 1996

Met, pursuant to assignment, at 1:30 p.m.

BEFORE:

Chairman Craig Glazer

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VOLUME I

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point I'll turn it over to Dr. Aron to kind of give, from an economist point of view, why it's also not appropriate to price at incremental cost.

CHAIRMAN GLAZER: I want to stick to the 20 minutes, so why don't we get that in when we get to the specifics of the issue.

MR. MULCAHY: I just wanted to mention one thing. Dr. Aron is only available today, so if there are questions, I would appreciate -- because of her schedule, she's only available today.

CHAIRMAN GLAZER: And she's here on the cost studies?

MR. MULCAHY: Not on the cost studies themselves, but on the theory of the cost studies.

CHAIRMAN GLAZER: All right. I'd like to go back to a -- start with a legal issue. With the lawyers here, we should start with the legal issue, and it was an issue which the Commission flagged in its February 22nd entry.

Mr. Mulcahy, you expressed some confusion as to what statutes we're operating under. Well, I mean, that doesn't come as any surprise, this proceeding was filed and began when, under Section 4905.26 of the Ohio Revised Code, there was no

telecommunications law at that time, and at some point, I don't remember the exact date, but at some point in this proceeding, the Federal Telecommunications bill was passed, so all this confusion you say is -- I mean, that's why there is this confusion, there was an intervening event from when we started this proceeding till now.

That being said, I really would like to ask both parties to address the -- to what extent the Federal Act has any bearing on the procedural aspects of this case, whether you feel that we should operate solely under the federal statute, solely under the State statutes, under both, and under neither, and what -- flush out for us the impact of the Federal Telecommunications bill in general to this whole issue.

MR. RANDAZZO: As indicated by Marsha earlier, my name is Sam Randazzo, and I'm counsel with Time Warner in this matter.

It is our view, really in terms of your ability to act, that you have the ability to use both state and federal law to fashion an appropriate result here. It is not an either or context.

It seems to us that this matter is important enough that you ought to draw from whichever resource best suits both the timeliness and the

appropriateness of the response that you would like to issue.

It is clear under federal law that there is nothing that is taken away from the states in terms of the state's ability to fashion interconnection arrangements. I believe that provision is in Section 252 of the new Act.

So there is a clear representation in federal law that there is no preemption, if you will, of the ability of states to act, carry out interconnection arrangements under existing federal, or existing state law.

The federal law does have, I think as Mr. Mulcahy indicated earlier, does have some requirements that deal with substantive outcomes that are possible, that references the cost on traffic termination and transport, and I would take issue with a couple of things that Mr. Mulcahy said with regard to reciprocal compensation and bill and keep.

Number portability, the suggestion that it's not to be tied to costs, numbers are a network element under the federal definitions, and the pricing standards apply to network elements.

Transit termination is transport or termination, whatever you want to call it, and it also

is affected by the pricing standards under the federal law, but those are examples of outcomes that are affected by the federal law.

But it is only the procedural significance of the federal law; you have every right to proceed under existing state law, and you have every right to use resources that are available to you under federal law as well to fashion an acceptable outcome.

CHAIRMAN GLAZER: Do you feel that the -- the federal law sets forth specific methodologies for setting prices for these -- some of these services that we're talking about? It uses the phrase reasonable approximation of additional costs, and bill and keep.

Two questions. Do you feel that we should use one of those two standards, that those are the two that we should choose from in this menu; and do you feel that we're limited to one of those two choices?

MR. RANDAZZO: Well, I think the federal law is very prescriptive in terms of the need to use cost. That seems to be abundantly clear.

Then the question is which type of costs. And here again, I think the federal law is also clear. It refers to additional costs which is an incremental